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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 642

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, AS SUCCESSOR TO HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Connecticut (R. 250–257) is not reported. The opinion of the Circuit Court of Appeals (R. 277–282) is reported at 164 F. (2d) 466, *sub nom. Palmer et al.* v. *Reconstruction Finance Corporation.*

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 4, 1947 (R. 283). On December 20, 1947, the same court denied petitioner's petition for rehearing (R. 306). The petition for certiorari was filed on March 4, 1948. On March 25, 1948, respondent's time to answer the petition was extended to April 20, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Reconstruction Finance Corporation's letter of December 21, 1938, resulted in a legally enforceable obligation of the Corporation to reduce the interest rate on petitioner's indebtedness to the Corporation.

2. Whether the Circuit Court of Appeals was correct in refusing to consider the applicability of a New York statute which had not been called to the attention of the District Court.

3. Whether petitioner may now rely upon Section 122 of the Negotiable Instruments Law which it failed to call to the attention of either of the courts below.

STATUTES INVOLVED

The pertinent portions of the New York statutes involved and of the Restatement of Contracts are set forth at the appropriate point in the argument.

STATEMENT

During the period from May 24, 1933, through December 22, 1934, respondent made loans to The New York, New Haven and Hartford Railroad Company (hereinafter referred to as the Debtor) of $7,699,778.34. These loans were secured by collateral and were evidenced by promissory notes of the Debtor which bore interest by their terms at the rate of 5% per annum. On October 23, 1935, which was the date on which the Debtor filed a petition for reorganization under Section 77 of the Bankruptcy Act, as amended, the unpaid principal balance of the loans amounted to $7,686,054.53.

On November 10, 1938, the Debtor's Trustees (hereinafter referred to as the Trustees) wrote to respondent's Chairman pointing out that the principal amount of these notes had been reduced through payments of income from the pledged collateral to $6,944,018.41 and requesting that the interest rate on these notes be reduced to 4% per annum as of November 1, 1938 (R. 228–229). By letter dated December 21, 1938, Mr. Jesse H. Jones, who was at that time respondent's Chairman, wrote the Trustees as follows (R. 229–230):

> DEAR SIRS: Referring to your letter of November 10, beg to advise that if, in the reorganization of The New York, New Haven and Hartford Railroad Company, the claims of this Corporation have been fully paid, this Corporation will accept 4 per cent from the date of bankruptcy in

full settlement of the interest, regardless of the rate named in the face of the note.

Should the road not be able to arrange private financing on reasonable terms, we will be glad to discuss with it a loan to the reorganized company for this purpose and to effect a reorganization.

Yours very truly,

JESSE H. JONES,
Chairman.

The Trustees did not acknowledge Mr. Jones' letter of December 21, 1938, and indeed made no reference to it until 1945, over six years later, and no claim based upon it until 1946, when the petition for Order 891 (R. 222–232) was filed.

On January 29, 1945, the Trustees wrote respondent pointing out that the unpaid principal of the notes had been reduced to $4,083,111.37 as of December 31, 1944, and stating that "we now earnestly request a retroactive reduction in interest to 4% since October 23, 1935, on the R. F. C. loans and a reduction to 3% on both R. F. C. and P. W. A. loans from now on" (R. 230–232). Although this letter mentioned Mr. Jones' letter of December 21, 1938, it did not rely on it as a basis for the request. On February 14, 1945, Mr. Charles B. Henderson, at that time respondent's Chairman, wrote to the Trustees advising that the respondent was unwilling to grant the request made in their letter of January 29, 1945, but that the respondent consented to the reduction to 4%

per annum, effective as of January 1, 1945, in the interest rates on the notes evidencing its loans to the Debtor (R. 232–233). Such reduced interest rate of 4% per annum accordingly became effective as of January 1, 1945.

The Trustees again wrote to respondent on June 18, 1946, in part as follows (R. 225):

> In view of the continuance of low money rates, the fact that the loans have always been amply secured, and that most of the principal has been repaid even after application of the higher interest rate, we renew our request for a rate of 4% for the whole period of the proceedings with the understanding if you are agreeable that we will petition the Court for an order providing for the pledge of the former Railroad Credit Corporation collateral with your Corporation in consideration of the reduction.

On June 25, 1946, Mr. Henderson again denied this request (R. 225).

On July 11, 1946, the Trustees filed a petition (Petition for Order No. 891) advising the District Court that the balance of principal as of June 7, 1946, on the notes was $2,190,912.96, and requested an order authorizing the petitioners to pay and discharge these notes on a 4% basis (to be applied retroactively from October 23, 1935, the date when the Debtor filed its petition for reorganization) and directing respondent upon such payment to surrender to the petitioners

the notes and the collateral securing the notes (R. 222–233). The foundation of this petition was Mr. Jones' letter of December 21, 1938.

There was a hearing on Petition for Order No. 891 on August 2, 1946, and later briefs and reply briefs were filed both by respondent and the Trustees.

The District Court and the Circuit Court of Appeals both expressly found that Mr. Jones' letter was "never answered, nor did they [the Trustees] ever promise to pay the notes, or tender payment" (R. 251, 278–279). The District Court also found that there was no consideration for the letter (R. 252), and that the doctrine of promissory estoppel was not applicable because there was no "showing that reliance on the letter caused an actual forebearance on the part of the Trustees" (R. 257). Indeed, the District Court expressly found that "the failure of the Trustees to refinance the R. F. C. loan may more reasonably be attributed to the shape of the [reorganization] plan and to their reluctance to introduce an additional complication into cumbersome [reorganization] proceedings than to the inducement of Mr. Jones' promise" (R. 256). The Circuit Court of Appeals expressly held that these findings of the District Court were adequately supported by the evidence (R. 281). Indeed, both courts found that the Trustees' conduct revealed that as late as January 1945 and

June 1946 they did not believe that there was a binding obligation on respondent's part to accept interest at 4% rather than 5% (R. 255, 281).

The difference between 5% interest and 4% interest on the loans here involved, between October 23, 1935, and January 1, 1945, is approximately $800,000 (R. 241).

ARGUMENT

The questions on the merits in this case are (1) whether there was any consideration for the offer contained in the R. F. C. letter of December 21, 1938, (2) if not, whether petitioner may recover on the basis of promissory estoppel, and (3) if not, whether petitioner may recover under Section 33 (2) of the New York Personal Property Law or Section 122 of the Negotiable Instruments Law. In the courts below, petitioner's primary reliance was upon promissory estoppel. The Circuit Court of Appeals refused to determine the applicability of Section 33 (2) inasmuch as petitioner had not based its claim upon it and had referred to it for the first time in the reply brief filed in that court. Petitioner's first mention of Section 122 was in its petition for certiorari in this Court.

Neither of the lower courts indicated what law it was applying. The District Court relied mainly on federal citations (R. 252), the Circuit Court of Appeals on none. The brief filed by R. F. C.

counsel in the court below suggested that New York law applied, and petitioner now bases its argument upon that hypothesis. We can assume this to be so for purposes of this brief, although, since the contract was with an agency of the United States, it may be that federal law (which we conceive to be the generally recognized common law as set forth in the Restatement of Contracts and accepted by the federal courts prior to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64), is controlling. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 296; *United States* v. *Allegheny County,* 322 U. S. 174, 182, and cases cited. In this case, whichever law applies, petitioner cannot establish its claim.

1. There was clearly no consideration for the R. F. C. offer to reduce petitioner's interest rate. The letter of December 21, 1938, was merely an offer to reduce a preexisting obligation. Petitioner made no promise in return and, in fact, did not even acknowledge R. F. C.'s letter. In any event, a mere promise to pay an existing debt would not constitute sufficient consideration. Restatement of Contracts, secs. 76, 78; *Vanderbilt* v. *Schreyer,* 91 N. Y. 392. R. F. C.'s letter, at the most, was a conditional offer.[1] As a condi-

[1] Although the letter of December 21, 1938, contains no time limit, the second sentence indicates that refinancing within some reasonable time was contemplated, not that the R. F. C. would reduce the interest rate if its claims were fully paid

ditional offer, it could be withdrawn at any time prior to performance of the condition. Williston, *Contracts* (Rev. Ed. 1936) §§ 55, 60. By its letter of February 14, 1945 (R. 232–233), R. F. C. must be deemed to have withdrawn its earlier conditional offer (if it had not already expired) at a time prior to the payment of its claims against petitioner. If New York law is deemed applicable, it is specifically adverse to the petitioner; for *Petterson* v. *Pattberg*, 248 N. Y. 86, holds that a conditional offer may be withdrawn at any time prior to complete performance of the condition.[2]

Petitioner relies (Pet. pp. 58–59) upon the Restatement of Contracts (1932) Section 45,[3] contending that in reliance upon the 1938 letter, it thereafter made payments upon the notes to which

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at some time in the indefinite future prior to termination of the reorganization. R. F. C. properly did not regard petitioner's invocation of the letter 7½ years later as a compliance with the offer, particularly since during the period intervening between the letter and the institution of this litigation the indebtedness had been reduced only out of the proceeds of R. F. C.'s collateral and the income therefrom.

[2] See *M. V. T. Corp.* v. *Mt. Vernon Lodge*, 263 App. Div. 849, where the rule of *Petterson* v. *Pattberg* was applied on facts similar to the present case.

[3] Section 45 of the Restatement reads as follows:

"*Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender.* If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

R. F. C. was not otherwise entitled (Pet. 62–63); and that such partial performance converted the offer into a binding obligation. To the contrary, petitioner's vice-president testified that all the payments that had been made on the reduction of petitioner's indebtedness to R. F. C. represented income and proceeds of the collateral pledged to R. F. C. (R. 240). No payments from any other source were made to R. F. C. between the date of the letter and commencement of this proceeding.[4] Since R. F. C. was unquestionably entitled to these payments in any event, they cannot be said to have been induced by the 1938 letter. Thus, petitioner has not met the requirements of Section 45, inasmuch as no "part of the consideration requested in the offer [was] given or tendered by the offeree in response thereto." Moreover, in New York it has been

[4] The final payment, made after the decision of the District Court (and therefore not in the present record, but see petition, p. 29), was the only payment not made out of proceeds or income from R. F. C.'s collateral. This payment was accepted by the R. F. C. on the express condition that "Nothing contained herein shall be construed to operate to the prejudice of this corporation in said litigation." R. F. C.'s letter of August 21, 1947, to Edwin S. S. Sunderland, Counsel for Reorganization Committee for the New York, New Haven and Hartford R. Co. These facts are not contained in the present record, since they occurred after the trial in the District Court. Inasmuch as petitioner has not limited itself to the facts of record, we have deemed it proper to bring the additional facts set forth herein to the Court's attention. The correspondence referred to is available to the Court for examination.

held that a conditional offer becomes a contract only upon complete performance, not partial performance, of the condition, and that Section 45 of the Restatement of Contracts is inconsistent with *Petterson* v. *Pattberg, supra. Quincy & Co. Arbitrage Corp.* v. *Cities Service Co.*, 156 Misc. 83, affirmed, 253 App. Div. 719. Thus, if New York law is applicable, petitioner cannot invoke Section 45 at all.

2. As has been indicated, petitioner did not seriously contend below that there was consideration for the R. F. C.'s offer (R. 243), but placed most of its reliance upon the doctrine of promissory estoppel. The trial court accepted that doctrine, as enunciated in Section 90 of the Restatement of Contracts (R. 252).[5] Section 90 requires that the promise induce action or forbearance on the part of the promisee. The only action or forbearance which petitioner asserts was induced by the R. F. C. letter of December 21, 1938, is that in reliance upon the promise to reduce the interest rate to 4%, the trustees of petitioner refrained from refinancing the R. F. C. loan through

[5] Section 90 provides that "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Federal cases applying this principle prior to *Erie R. Co.* v. *Tompkins*, include *James Baird Co.* v. *Gimbel Bros.*, 64 F. (2d) 344 (C. C. A. 2); *Curtiss Candy Co.* v. *Silberman*, 45 F. 2d 451 (C. C. A. 6).

other channels on a 4% basis. In the District Court, Judge Hincks found that petitioner had failed to establish any such reliance upon the R. F. C. letter. Indeed, he pointed out that there were other factors and conditions in petitioner's reorganization which were probably more determinative of the refinancing question (R. 252–257). It is significant that this finding was made, not by a district judge sitting in an ordinary diversity case, but by the district judge who, having exercised bankruptcy jurisdiction over the petitioner from 1935 to 1947 (R. 1–2), possessed a unique knowledge of the circumstances surrounding the possibility of refinancing. This finding was specifically reviewed and approved by the Circuit Court of Appeals (R. 281–282). Since there was no reliance, it follows that the courts below correctly held that petitioner could not recover on the theory of promissory estoppel. Whether they were correct or not in interpreting the facts does not in any event present a question for review by this Court.

Moreover, the doctrine of promissory estoppel is applied in New York only to charitable subscriptions. *Allegheny College* v. *National Chautauqua County Bank*, 246 N. Y. 369; *I. & I. Holding Corp.* v. *Gainsburg*, 276 N. Y. 427. New York does not apply the doctrine of promissory estoppel to commercial transactions. *Kahn* v. *Cecelia Co.*, 40 F. Supp. 878 (S. D. N. Y.). Thus, if petitioner is correct in its contention that New

York law governs, it cannot rely upon promissory estoppel.

3. Petitioner, in its reply brief filed with the Circuit Court of Appeals, contended for the first time that the R. F. C. letter of December 21, 1938, constituted a binding agreement to reduce the interest rate within the meaning of Section 33 (2) of the New York Personal Property Law (*infra*, p. 15). The Circuit Court of Appeals refused to consider this question, stating that "although it is true that we may affirm a judgment upon grounds not urged in the lower court, we may not reverse one upon such a ground." Petitioner urges upon this Court that such refusal of the court below was erroneous in the light of *Hormel* v. *Helvering*, 312 U. S. 552, and *Helvering* v. *Richter*, 312 U. S. 561, and similar cases. We believe that the court below did not abuse its discretion in this regard. In any event, assuming New York law to govern, the New York statute does not give petitioner a cause of action.

(a) As this Court pointed out in *Hormel* v. *Helvering* (p. 556), "ordinarily an appellate court does not give consideration to issues not raised below." That case, as well as the *Richter* case, involved the unusual situation where subsequent to the decision of the Board of Tax Appeals, the intervening decision of this Court in *Helvering* v. *Clifford*, 309 U. S. 331, had brought about a change in the applicable law. See *Commissioner* v. *Sunnen*, No. 227, this Term, decided

April 5, 1948. As this Court pointed out in *Vandenbark* v. *Owens-Illinois Co.*, 311 U S. 538, 541, the intervention of new law or of a change in the law between trial and appeal has, since *United States* v. *Schooner Peggy,* 1 Cranch 103, 110, been recognized as creating an exception to the general rule. Here there was no change in the law. Section 33 (2) was not new; apparently it was merely new to petitioner. Neither *Hormel* v. *Helvering,* nor any other case cited by petitioner, suggests that an appellate court abuses its discretion by refusing to consider new issues in such circumstances. On the contrary, even the *Hormel* case (which the court below cited) recognizes the "general principle" (312 U. S., at 557) and the exceptional nature of departures from the "general practice" (*id.,* at 558, 560). As the Circuit Court of Appeals for the Eighth Circuit stated in *Helvering* v. *Rubenstein,* 124 F. (2d) 969, after concluding that the *Hormel* case "does not indicate any intention * * * to abandon the rule," and that it dealt with an "exceptional situation":

> But this right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below, is a right to prevent a clear miscarriage of justice apparent from the record, and not a right to afford a defeated litigant another day in court because he thinks that if he were given the opportunity to

try his case again upon a different theory he might prevail.

The rule that an appellate court will not ordinarily consider questions not tried below is an important rule of appellate procedure and one which is usually not unjust to litigants. It requires them to deal fairly and frankly with each other and with the trial tribunal with respect to their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation.

(b) In any event, the cases which allow departure from the general rule that new issues may not be raised on appeal, seem to do so only where application of the rule would result in a plain miscarriage of justice. Here the findings of fact by the District Court, as approved by the court below, preclude any reliance by petitioner upon Section 33 (2).

Section 33 (2) provides in effect that *"an agreement"* to change, modify, or to discharge in whole or in part, any obligation, shall not be invalid for lack of consideration if such "agreement" is in writing and signed by the person against whom it is sought to enforce the change, modification or discharge.[6] The section has not

[6] The section reads as follows:

"An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence

been interpreted by the New York courts in any manner pertinent here. But it clearly requires an "agreement." The history of the section shows that by "agreement" was meant a *"mutual agreement"* of which the writing is evidence, rather than a unilateral declaration.[7]

The best evidence as to whether the R. F. C. letter of December 31, 1938, reflects such an agreement, is the parties' subsequent conduct with respect to it. As this Court has said, "There is no surer way to find out what parties meant than to see what they have done." *Lowrey* v. *Hawaii,* 206 U. S. 206, 222. The trial court found, and the court below concurred, that the conduct of petitioner's predecessor trustees was inconsistent with that of men who believed that R. F. C. had committed itself to reduce the interest rate. Pointing to the trustees' letter

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of consideration, provided that the agreement changing, modifying or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge."

[7] See the 1936 Report of the New York State Law Revision Commission in which the Commission recommended the enactment of Section 33 (2) in its present form (pp. 73–80). The Commission said: "However, the Commission believes that once a binding contract has been made the parties thereto should be empowered to change the terms of that contract, or to discharge obligations thereunder, by *mutual agreement* without additional consideration, provided the agreement modifying or discharging the contract is in writing and signed by the party against whom it is sought to be enforced." [Italics supplied.]

of January 29, 1945, to R. F. C. saying that "we now earnestly request a retroactive reduction in interest to 4%" (R. 230–232), the trial court found (R. 255–256) that "their letter contains not the slightest intimation that they had relied or were still relying upon a settlement on the basis of Mr. Jones' earlier letter [the letter of December 21, 1938]." The Circuit Court of Appeals put it even more strongly, pointing out that the trustees' "three later efforts to induce the R. F. C. to reduce the interest 'retroactively' were inconsistent with their present position" (R. 281). In the trustees' letter of June 18, 1946, to R. F. C., they wrote, in part, as follows: "we renew our request for a rate of 4% for the whole period of the proceedings" (R. 225). Referring to this letter, the court below concluded (R. 281) that, "Surely, if they then believed that they had a valid right to the reduction, * * * that was the occasion to say that they had been relying all along upon the promise, and that the R. F. C. was, in honor at least, bound to perform it." Similarly, this was the time to assert, if such was the case, that there existed an agreement within the meaning of Section 33 (2) of the New York Personal Property Law. The fact that in June 1946, the trustees were prompted to "renew our request," rather than to assert the alleged earlier agreement, compels the conclusion that such an agreement never existed.

4. There remains to be considered petitioner's belated reliance (for the first time in this Court) upon Section 122 of the Negotiable Instruments Law. This section provides that the holder of an instrument may in writing "expressly renounce" his rights under it.[8] It is to be noted that petitioner offers no justification for its failure to direct the attention of either the District Court or the Circuit Court of Appeals to Section 122. In any event, Section 122 is made entirely inapplicable by the findings of both lower courts referred to above. Here again, petitioner's repeated requests, subsequent to the R. F. C. letter of December 21, 1938, for a reduction in the interest rate are inconsistent with its present claim that the 1938 letter constituted an express conditional renunciation by R. F. C. of its right to obtain 5% interest from petitioner. Petitioner's letters of January 29, 1945, and June 18, 1946, coupled with petitioner's unexplained failure to present this contention in the earlier phases of this litigation, demonstrate that it never occurred to anyone prior to this stage of the litigation that R. F. C. had made an express re-

[8] The section reads as follows:

"The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

nunciation of any of its claims within the meaning of Section 122 of the Negotiable Instruments Law. Again, if New York law is controlling, it is to be observed that the New York Court of Appeals has stated that Section 122 (Section 203 of the New York N. I. L.) permits the discharge of an obligation in the absence of consideration "only by such a writing as demonstrates a present, absolute and unconditional intention to renounce." *Bank of United States* v. *Manheim*, 264 N. Y. 45, 48–49 (1934); *Leask* v. *Dew*, 102 App. Div. 529, affirmed, 184 N. Y. 599. The R. F. C. offer here was obviously conditional.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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